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Supreme Court, U.S.
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No. 04-407

IN THE

Supreme Court of the United States

BARKER SANITATION,

Petitioner,

v.

CITY OF NEBRASKA CITY, NEBRASKA and
WASTE CONNECTIONS OF NEBRASKA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF NEBRASKA CITY, NEBRASKA

STEPHEN S. GEALY
Counsel of Record
MOLLY M. BRUMMOND
BAYLOR, EVNEN, CURTISS,
GRIMIT & WITT, LLC
1248 "O" Street
Suite 600
Lincoln, NE 68508
(402) 475-1075

Attorneys for Respondent
City of Nebraska City, Nebraska

190507

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly affirmed the decision of the District Court for the District of Nebraska that Nebraska City Ordinance 2505-2000 does not violate the dormant Commerce Clause of the United States Constitution.

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CITY ORDINANCES

Nebraska City, Nebraska Ordinance 2505-2000 .. *passim*

STATEMENT OF THE CASE

I. *Background of the Case*

Barker Sanitation filed this lawsuit against the City of Nebraska City, Nebraska, (hereinafter "City") alleging that an ordinance (specifically Ordinance 2505-2000) adopted by the City, and the Franchise Agreement and Lease Agreement associated therewith: (1) violated the dormant Commerce Clause of the United States Constitution (Article I, Section 8, clause 3); and (2) caused a taking of its property rights in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 21 of the Nebraska Constitution.

The United States District Court for the District of Nebraska entered a Memorandum and Order dismissing Barker Sanitation's takings claim under the U.S. Constitution and the Nebraska Constitution due to lack of standing. Additionally, the Court summarily dismissed Barker Sanitation's claim that the City's decision to award the exclusive franchise to Waste Connections violated the dormant Commerce Clause of the U.S. Constitution. However, the Court allowed the case to proceed to trial as to the issue of whether the Franchise Agreement itself violated the dormant Commerce Clause.

This issue was tried in a one-day trial to the bench on July 25, 2003. In its Findings of Fact and Conclusions of Law dated November 4, 2003, and the Judgment issued in connection therewith, the District Court determined that Ordinance 2505-2000 was not discriminatory on its face, in its purpose, or in its effects and was not, therefore, overtly discriminatory. (Pet. App. B at 22a-27a). Additionally, the Court found that the Ordinance's burden on interstate

commerce was incidental and outweighed by its local benefits. (Pet. App. B at 27a-31a). As a result, the Court dismissed Barker Sanitation's claim and held that Ordinance 2505-2000, and the associated agreements, did not violate the dormant Commerce Clause provisions of the U.S. Constitution. (Pet. App. B at 31a-32a).

Barker Sanitation appealed this decision to the Eighth Circuit Court of Appeals, contending that the District Court erred in determining that the ordinance was not adopted for a discriminatory purpose, did not have a discriminatory effect, and that the local benefits of the ordinance outweighed the incidental burdens it placed on Interstate Commerce. Following argument, the Eighth Circuit Court of Appeals affirmed the District Court's decision without further discussion, finding that the case had been properly analyzed at the trial court level. (Pet. App. A at 1a-3a). In response, Barker Sanitation timely filed this petition for writ of certiorari.

II. *Misstatement of Facts*

Barker Sanitation set forth a portion of the facts material to this matter in its Petition for Writ of Certiorari. However, because not all of the facts relevant were made part of that petition, and because the City recognizes its obligation to set forth any misstatement of fact, the City sets forth the following as misstatements made by Barker Sanitation:

1) In its petition, Barker Sanitation indicates that the District Court found that "Nebraska City sought to implement a measure to keep the tonnage in Nebraska and thus increase volume at its transfer station." (Petitioner's Writ at 2). The District Court, however, did not make a finding

that the City's concern was to "keep the tonnage in Nebraska" as the Petitioner asserts. Rather, the evidence was clear, and thus the District Court found, that

> [a]n advisory committee of the Agency suggested that privatization of the Transfer Station could be a solution, but '[w]hatever solution is formulated, the bond payments still have to be made.' The committee members stated that 'their number one concern would be to rent the [transfer station] for at least the amount of the bond payments.

(Pet. App. B at 7a). No evidence indicated that during these discussions the City was concerned about keeping the tonnage within the State of Nebraska.

2) Barker Sanitation contends that

> Nebraska City decided to issue an exclusive franchise for the collection of solid waste in Nebraska City [sic] provided that prospective bidders 'will agree . . . to deliver to the Nebraska City Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees.'

(Petitioner's Writ at 2). The evidence before the trial court clearly indicates that the Franchise Agreement itself was void of any language which required the franchisee to deliver waste collected within the City to the Transfer Station or to any other designated facility. To the contrary, the evidence indicated that

> [w]hile the RFP stated that the City was seeking proposals from qualified firms who, within the initial

> 12 months of the Franchise Agreement, would agree to take all waste collected in Nebraska City to the Nebraska City Area Solid Waste Agency Transfer Station, this requirement was never included in the Franchise Agreement and Lease with Waste Connections. (Trial Exs. 7 & 8; Tr. 206, Test. Adelung.)

(Pet. App. B at 16a).

3) In its Petition, Barker Sanitation indicates that its "normal routine was to pick up the garbage in Nebraska City and transport it back over the boarder to unload it at a transfer station in Iowa." (Petitioner's Writ. at 3). It is important to note that the City was unaware and unconcerned with where Barker Sanitation deposited the waste. Rather, it warned Barker Sanitation to cease and desist from collecting the waste because "it was violating the Ordinance and the Franchise Agreement." (Pet. App. B at 16a).

4) Barker Sanitation indicates that the District Court "found that Nebraska City Ordinance 2505-2000 was admittedly an economic motive." (Petitioner's Writ. at 8). However, the District Court actually held, "The evidence in this case establishes that several other local interests were discussed by the City Council for Nebraska City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and before entering into the Franchise Agreement with Waste Connections . . ." (Pet. App. B at 28a). The District Court then listed those local interests. The trial court then concluded that

> [i]n light of the numerous local benefits that would be achieved by Nebraska City's Ordinance (and a

> Franchise Agreement and Lease entered into pursuant to the Ordinance) and the incidental burden that the Ordinance and associated agreements imposed upon interstate commerce [the Court] must conclude that the Defendant has not violated the dormant commerce clause enacting the exclusive franchise ordinance under *Pike*.

(Pet. App. B at 31a).

III. *Statement of Facts*

The City does not generally dispute the District Court's Findings of Fact which are set forth as follows:

1) The plaintiff, Barker Sanitation, is an Iowa limited liability corporation in business as a refuse collection service since February 1, 2002. The defendant, City of Nebraska City, is an incorporated governmental entity organized and existing under the laws of the State of Nebraska. The intervening defendant, Waste Connections of Nebraska, Inc., is a Delaware corporation which operates a waste collection and disposal business in the State of Nebraska. (Addendum p. 25).

2) Nebraska's Integrated Solid Waste Management Act, NEB. REV. STAT. §§ 13-2001 to 13-2043 (Lexis 1995 & Cum. Supp. 2002) requires municipalities like Nebraska City to "provide or contract for facilities and systems as necessary for the safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." NEB. REV. STAT. § 13-2020(1) (Lexis Cum. Supp. 2002). The Nebraska City Area Solid Waste Agency (the "Agency") is a joint entity

formed by the City of Nebraska City and the Village of Talmage, Nebraska, pursuant to Nebraska's Interlocal Cooperation Act, NEB. REV. STAT. § 13-801 to 13-827, that is governed by a five-member board comprised of Nebraska City's mayor and city council members. The Agency's sole purpose is ownership of the Nebraska City Area Solid Waste Agency Transfer Station ("Transfer Station") and retirement of the bonds which were issued for its construction. The Agency does not become involved in, or regulate, trash collection in Nebraska City. (Transcript pgs. 92-93, 100, 140-41, 189, Test. Adelung; Appendix pgs. 68-147; Attachment, Interlocal Cooperation Act Agreement Creating the Nebraska City Area Solid Waste Agency.)

3) At least since April of 1997, the Agency and City Council have been continually concerned about a significant drop in tonnage at the Transfer Station due to "so much competition for solid waste." An advisory committee of the Agency suggested that privatization of the Transfer Station could be a solution, but "[w]hatever solution is formulated, the bond payments still have to be made." The committee members stated that "their number one concern would be to rent the [transfer station] for at least the amount of the bond payments." (Appendix p. 73; Appendix p. 109). ("The answer to making the transfer station financially sound is to increase volume."); Appendix pgs. 122-123

> Mr. Clyde Stoll, Otoe County Commissioner, stated that the only savings the City would experience by closing the transfer station would be the $10,000 operating expenses as the bond payment and the minimum tonnage requirements are ongoing. The solution is to get the tonnage back. He suggested that the haulers sign a

> commitment to bring their trash to the transfer station.

Appendix p. 165.

> Commissioner Stark stated that we are having problems now because haulers committed to bring tonnage to our transfer station and we contracted with a landfill based on those commitments. Now the haulers are not bringing the solid waste as they had committed, leaving the transfer station in a precarious financial position.

4) On or about February 11, 2000, Nebraska City's City Council conducted a special session for the purpose of hearing from prospective bidders and to approve the issuance of a Request for Proposals ("RFP") from bidders seeking an exclusive five-year Franchise Agreement for solid waste disposal collection services within corporate limits of Nebraska City. On February 14, 2000, Nebraska City issued the RFP. The RFP repeatedly stated Nebraska City's specification that during the first year (April 1, 2000, to March 31, 2001) of the exclusive Franchise Agreement, the contractor "will agree . . . to deliver to the Nebraska City Area Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees," as well as "[a]ll recyclables that are designated by the City and collected from the bins or otherwise from within the City." (Appendix pgs. 201-204).

5) With regard to the RFP specification that waste be delivered to the Nebraska City Area Solid Waste Agency Transfer Station, Mayor Adelung testified that:

> [D]uring this time period, we had haulers who, for one reason or another throughout this time period, began diverting their trash elsewhere. They're collecting trash and they're taking it elsewhere. The City was — My take on this is that personally and the City was concerned about the good faith efforts of who we were going to be entering into an agreement with for doing the collection because there was just kind of a lot of — I don't know if game playing is a good term to use that was going on. And so what I'm reading into this is that it was more that we were looking at good faith, that if you're going to — if we are even going to consider you having a franchise agreement to collect all of our solid waste in the City of Nebraska City, that you need to show some good faith, if you aren't collecting it now, that you would bring your trash to the transfer station as a good faith effort.
>
> You know, certainly as a council member or mayor, we did want the tonnage on February 14th, 2000 [the date the RFP was issued.]

(Transcript pgs. 198-99 & 202, Test. Adelung.)

6) The RFP also provided that from April 1, 2001, to March 31, 2005, the contractor "shall provide for disposal at a licensed Subtitle D landfill selected by and specified by the Contractor," during which time the contractor "shall agree

to pay the City a minimum franchise fee of $7,500 per month commencing April 1, 2001, and continuing for the duration of the agreement." (Appendix p. 201, ¶ 3; Appendix p. 203, ¶ 6.) The RFP gave applicants the option of submitting a separate proposal for lease or purchase of the Nebraska City Area Solid Waste Agency Transfer Station from April 1, 2001, to March 31, 2005. (Appendix p. 201, ¶ 4).

7) Three companies replied to the RFP — intervenor Waste Connections of Nebraska, Inc., Deffenbaugh Industries, Inc., and Brian Kelly — all of which were from a state other than Nebraska. On March 2, 2000, the City council for Nebraska City met with representatives from these companies to discuss their proposals. (Addendum p. 26, ¶¶ A(4)-(7).)

8) On March 21, 2000, Nebraska City Mayor Jo Dee Adelung and the City Council for Nebraska City convened jointly with the Nebraska City Area Solid Waste Agency to analyze the franchise proposals the City had received. (Appendix pgs. 175-176.) The minutes of that meeting summarize the City's interests in granting an exclusive franchise agreement: "1) making the solid waste bond payment, 2) local rates ideally remaining the same, 3) maximizing operating costs, 4) local place for yard waste, 5) satisfying contract with Hamm's Quarries." (Appendix p. 175; Transcript pgs. 121-23, 166-67 (Test. Adelung stating City's interests were accurately stated in minutes), 174-176.) During that meeting, John Heil, attorney for the City and the Agency, advised the City Council and Agency that franchising waste collection within Nebraska City and leasing the Transfer Station would be in the City's best interest because it would remove Nebraska City from the garbage business and provide certainty of citizen rates.

> The franchise fee and the lease fee that comes closest to meeting the bond payments [on the transfer station] is the best offer. Obviously the more waste that comes into the transfer station, the better the chances of meeting the required payments. The Commissioners propose to move away from financing the bond payments through taxes and make the [transfer] station self-sufficient.

Attorney Heil was directed to negotiate a lease and franchise agreement with applicant Waste Connections. (Appendix p. 176, ¶¶ 3 & 6.)

9) The Agency, in deciding whether to lease the Transfer Station to the exclusive franchisee, considered several factors: the Agency would no longer be responsible for staffing the Transfer Station; the Agency would no longer purchase equipment to operate the facility;; the Agency could focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizems. (Transcript pgs. 256-67, Test. Patrick Haverty.)

10) At another joint meeting between Nebraska City's City Council and the Agency on June 28, 2000, attorney Heil advised the Council and Agency that a franchise agreement and lease would require refinancing of solid waste revenue bonds to taxable bonds, with an estimated monthly obligation of $14,000. The proposed draft Framchise and lease Agreement each provided for a $7,000 monthly payment. "The lease, which is subject to the franchise agreement, is a seven[-]year lease with a seven[-]year renewal option. This matches the fourteen[-]year bond repayment schedule." (Appendix p. 179, ¶ 3.)

11) On July 20, 2000, Nebraska City's City Council passed and approved City Ordinance No. 2505-2000 (the "Ordinance"), which awarded to intervening defendant Waste Connections an exclusive franchise for waste collection within the corporate limits of Nebraska City. (Addendum p. 26; Appendix p. 228) Section 9 of the Ordinance provides as follows:

> The Mayor and Board of Commissioners of the City of Nebraska City, Nebraska, (the "City") hereby finds and determines that in view of the City's undertakings with respect to bonds issued by the Nebraska City Area Solid Waste Agency (the "Agency") and in order to provide for the orderly and efficient removal of solid waste within the City it is necessary and advisable for the City to enter into a Franchise Agreement with Waste Connections of Nebraska, Inc., a Delaware corporation, ("Waste Connections Nebraska") . . . ; that a Franchise Agreement with Waste Connections of Nebraska . . . [has] been prepared and submitted for approval by the Mayor and Board of Commissioners and that it is necessary and advisable that said agreement[] be approved and [its] execution authorized.

Section 11 of the Ordinance provides:

> Waste Connections of Nebraska, Inc., a Delaware corporation, is the exclusive franchisee of the City of Nebraska City for the collection and disposal of garbage, rubbish, trash or waste. It shall be unlawful for any other person to haul or collect for hire any garbage, rubbish, trash or waste for others in the city.

12) On August 30, 2000, the City and Waste Connections entered into a Franchise Agreement pursuant to the terms of the Ordinance. (Addendum p. 26; Appendix pgs. 231-245.) The preamble to the Agreement expresses the City's "desire . . . to contract with an independent contractor to provide for the operation of its municipal solid waste collection system in order that the public health and safety of the citizens of the City may be protected and preserved;" the fact that the City's solid waste collection system involves the collection and removal of recyclables and waste within the City limits and the use of a Transfer Station for receipt and transfer of such waste; the City's willingness to grant Waste Connections "an exclusive franchise for the collection and removal of recyclable[s] . . . and [waste] from the residences and businesses located in the City as part of an agreement for the operation of the municipal waste collection system;" and that Waste Connections would enter "into a Lease Agreement with the Nebraska City Area Solid Waste Agency for exclusive use of the Transfer Station for a term coterminous with this Agreement." (Appendix p. 231.)

13) The Franchise Agreement provides that Waste Connections "shall utilize a licensed subtitle D landfill disposal facility, in which Municipal Solid Waste collected from within the City limits shall be deposited." (Appendix p. 234, ¶ 8.) The City has agreed not to license or grant permits to any other waste or recyclable collector within City limits during the term of the Agreement, and Waste Connections has agreed to accept and process recyclables and waste at the Nebraska City Transfer Station pursuant to the terms of a separate Lease Agreement with the Nebraska City Area Solid Waste Agency. (Appendix p. 234, ¶¶ 10 & 12.)

14) The term of the Franchise Agreement is seven years, during which Waste Connections must pay the City a franchise

fee of $588,000, or monthly installments of $7,000. Waste Connections may renew the Agreement for one additional seven-year term, provided that Waste Connections also renews its Transfer Station Lease Agreement with the Nebraska City Area Solid Waste Agency for an additional seven years. (Appendix pgs. 246-247, 255.)

15) Also on August 30, 2000, the Nebraska City Area Solid Waste Agency and Waste Connections of Nebraska, Inc., entered into the Lease referred to in the Franchise Agreement, allowing Waste Connections to lease the property on which the Transfer Station sits for seven years, during which Waste Connections must pay the Agency $588,000, or monthly installments of $7,000. Waste Connections may renew the Lease for one additional seven-year term, provided that Waste Connections also renews its Franchise Agreement with Nebraska City for an additional seven years. (Appendix p. 246; ¶¶ 2, 4-5, 31.)

16) At the time the Franchise and Lease Agreements were entered into with Waste Connections, Mayor Adelung and City Finance Commissioner Patrick Haverty — who were both members of the City Council and the Solid Waste Agency — believed that if the Agency could not pay the bonds, the City would be financially responsible. (Transcript p. 191, Test. Adelung; Transcript p. 268, Test. Haverty.)

17) While the RFP stated that the City was seeking proposals from qualified firms who, within the initial 12 months of the Franchise Agreement, would agree to take all waste collected in Nebraska City to the Nebraska City Area Solid Waste Agency Transfer Station, this requirement was never included in the Franchise Agreement and Lease with Waste Connections. (Appendix pgs. 231-259; Transcript p. 206, Test. Adelung.)

18) In February, 2002, plaintiff Barker Sanitation began providing services to customers within Nebraska City. On May 9, 2002, Barker Sanitation received a letter from Nebraska City's legal counsel notifying Barker that it was violating the Ordinance and the Franchise Agreement. The letter warned that violation of the Ordinance could result in criminal fines or confinement and that each day such violation continued would constitute a separate and distinct offense. The City's legal counsel warned Barker Sanitation to cease and desist immediately, as the City intended to enforce the terms of the Ordinance. (Addendum pgs. 26-27; Appendix p. 260.)

19) Barker Sanitation's counsel responded to the City's cease-and-desist letter with a September 25, 2002, letter that characterized the City's ordinance as "improper flow control" which violates "the dormant provisions of the Interstate Commerce Clause." (Appendix pgs. 261-262.) In an October 7, 2002, City council meeting at which Barker's letter was addressed, Mayor Adelung stated:

> It was probably pertinent and important that maybe it's time that we go back to the citizens and explain one more time why we're in the position we are and the reason for the cost of the fees being as high as they are is because they have the bond payments, have to make the bond payments, and that the fee structure and the agreement for the lease fixed that, I mean, it was exact amount. We know what payment to the bonds are. That's why we are paying what we are paying for the garbage rates.

(Transcript pgs. 184-85, Test. Adelung.)

20) On other occasions in the past two years, the Nebraska City Mayor Adelung has explained to citizens the reason for the exclusive Franchise Agreement and Transfer Station Lease:

A. . . . I have talked on several occasions on the radio and everywhere else about that fact that we weren't generating enough revenue to provide the solid waste facility and our solid waste program for the City of Nebraska City and that included the bond payments.

Q. And so you were expressing to the citizens that it was an economic issue, correct?

A. That is correct.

Q. And that instead of going to taxes and taxing citizens, this was a better option of assessing and — or providing the franchise agreement, correct?

A. That is correct.

Q. And that was to protect the economic interest of Nebraska City, correct?

A. That is correct.

(Transcript pgs. 139:9-140:6, Test. Adelung).

21) Not all waste collected in Nebraska City pursuant to the exclusive Franchise Agreement goes to the Transfer Station for processing — for instance, Waste Connections

takes three roll-off container loads per week from a meat-packing plant directly to a Subtitle D landfill in Nebraska instead of to the Transfer Station first. Logistical issues have also caused Waste Connections to dump residential waste at other Subtitle D facilities, instead of at the Transfer Station in Nebraska City. Of the waste collected at the Nebraska City Transfer Station, Waste Connections routinely delivers some percent of it to the Mills County or Loess Hills Landfill in Iowa. (Transcript pgs. 272-73 & 285, Test. Scott Blanford (11 percent went to Iowa landfill during month of trial.)) *See* (A39-50: Findings of Fact and Conclusions of Law ¶¶ 1-21).

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Ordinance 2505-2000 and the associated Franchise and Lease agreements did not violate the dormant Commerce Clause. The Commerce Clause allows Congress to regulate interstate commerce, while the dormant Commerce Clause "is the negative implication of that clause. More specifically, the dormant provisions of the Commerce Clause prohibit states from enacting laws that discriminate against or unduly burden interstate commerce." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003) *citing Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

> The recognition of the dormant Commerce Clause carries out 'the Framers' purpose to prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within these boarders would not bear.'

Hazeltine, 340 F.3d at 593 (internal citations omitted.)

In this case, Barker Sanitation contends that the ordinance enacted by the City, and the exclusive Franchise and Lease agreements that were executed as a result thereof, violate the dormant provisions of the Commerce Clause. However, the ordinance and the agreements are not overtly discriminatory against Interstate Commerce. *See South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003); *S.D.D.S., Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995). Indeed, it is undisputed that neither the Ordinance nor the associated agreements facially discriminate against out-of-state interests. Further, there is no evidence which suggests that they discriminate either by their purpose or through their effects. *Id.* Finally, an application of the *Pike* balancing test reveals that the local benefits of the ordinance outweigh any burden imposed on Interstate Commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1994).

Because Barker Sanitation failed to produce evidence which either demonstrated that the ordinance and agreements were overtly discriminatory, discriminatory in their purpose or their effect, or that the local benefits were outweighed by the burdens imposed on Interstate Commerce, it was correctly determined that Barker Sanitation's claim against the City was without merit. As a result, that decision should stand and the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

Barker Sanitation contends that its petition for writ of certiorari should be granted because the Eighth Circuit Court of Appeals' decision to affirm the district court's judgment that conflicts with several of this Court's precedents relating to the dormant Commerce Clause. To summarize, Barker Sanitation argues that the appellate court erred when it upheld the District Court's finding that: (1) the Ordinance did not have a discriminatory purpose; (2) the Ordinance did not have a discriminatory effect; and (3) the incidental burdens on interstate commerce were minimal. These findings, Barker Sanitation argues, are contrary to rules set forth in several decisions handed down by this Court. However, Barker Sanitation fails to recognize that the facts presented in the cases cited differ from those in the case at bar. A correct application of the rules set forth in the cases cited merits a different result due to these factual distinctions. Because the analysis of the District Court is consistent with that applied in the cases cited by Barker Sanitation, the appellate court correctly affirmed this decision. Therefore, the petition for writ of certiorari should be denied.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DISTRICT COURT'S FINDING THAT THE ORDINANCE, FRANCHISE AGREEMENT, AND LEASE AGREEMENT DO NOT CREATE A FLOW CONTROL SCHEME WAS CONSISTENT WITH THIS COURT'S DECISION IN *CARBONE*.

First, Barker Sanitation contends that the Court of Appeals erred in determining that Ordinance 2505-2000 was not a flow control scheme implemented in order to control the processing of solid waste and hoard the economic benefit

purely for the purpose of protecting a local economic interest. This decision, Barker Sanitation argues, is inconsistent with this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S. Ct. 1677 (1994). In actuality, however, the lower court's decision in this case is directly in line with the *Carbone* case. *Carbone*, however, presents a significant factual difference that distinguishes this case and thus requires a different result.

Specifically, *Carbone* presented facts in which the law at issue discriminated against out-of-state interests on its face by specifically prohibiting in-state waste from leaving the state. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). In *Carbone*, there was direct, facial evidence that the state sought to insulate itself economically from the competition of out-of-state entities. Indeed, Barker Sanitation acknowledges that the ordinance in *Carbone* "required all nonhazardous solid waste from within the town to be deposited at the transfer station." (Petitioner's Writ at 7). In contrast to the *Carbone* ordinance, Ordinance 2505-2000 contains no such requirement. There is no language in the Ordinance, franchise agreement, or lease agreement which specifically prohibits waste from leaving the City or the State of Nebraska. In fact, there is no language which specifically directs Waste Connections where to take the waste. It is not required to go to the transfer station nor is it required to be deposited in another specified location. The solid waste is allowed to leave the City for out-of-state locations. Out-of-state waste may be brought into the City's transfer station. This key factual distinction required the District Court to reach a different conclusion than that reached by this Court in *Carbone*. As a result, the District Court's decision is consistent with *Carbone* and the petition for writ of certiorari should be denied.

II. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Was Not a Local Processing Requirement that Violates the Dormant Commerce Clause is Consistent with Prior Decisions of This Court.

Barker Sanitation next contends that the Appellate Court erred in affirming the District Court's finding that City Ordinance 2505-2000 was not a local processing requirement that violates the dormant commerce clause, and that this decision is inconsistent with several of this Court's previous decisions. (Petitioner's Writ at 8-9). Barker Sanitation argues that "the issue is not whether the waste ultimately ended up in an in-state or out-of-state landfill, but rather an ordinance that hoards waste for local processing at the transfer station at the cost of interstate commerce." (Petitioner's Writ at 9).

Again, nothing in the Ordinance, Franchise Agreement, or Lease Agreement requires Waste Connections to process the waste locally. The evidence presented at trial indicated that Waste Connections actually processed a portion of the waste out-of-state. (Pet. App B at 18a). As a result, the waste simply is not "hoard[ed] for local processing at the transfer station" as Barker Sanitation contends. Consequently, the district court's decision is consistent with the rules set forth by this Court.

III. The Court of Appeals's Decision to Affirm the District Court's Finding That The Ordinance Did Not Have a Discriminatory Effect Is Consistent with Prior Decisions of This Court.

As its third argument as to why its petition for certiorari should be granted, Barker Sanitation contends that Ordinance 2505-2000 is discriminatory through its effects. It is true that a regulation that is facially neutral and not purposed with a discriminatory intent may, in its practical effect, discriminate against interstate commerce. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 148 n.1, 106 S. Ct. 2440, 2453 n.19 (1986) (facially neutral statute but discriminatory effect.) However, the Ordinance at issue simply does not have a discriminatory effect. As a result, the trial court decided, and the appellate court correctly affirmed, that the ordinance did not violate the dormant Commerce Clause in this regard.

Barker Sanitation claims that the ordinance prevents out-of-state competitors from processing the City's waste because Ordinance 2505-2000 grants an exclusive franchise to Waste Connections. However, Barker Sanitation presented no evidence which indicated either that the collection or the disposal aspects of the solid waste market were impacted by Barker's absence from the interstate marketplace. Rather, the evidence presented at trial clearly demonstrated that the Ordinance does not control where the waste collected from within the City is deposited. (Pet. App. B at 12a-16a). Similarly, Barker Sanitation presented no evidence to support its contention that out-of-state recipients were denied waste as a result of the Ordinance. To the contrary, the evidence presented at trial indicated that Waste Connections disposed of solid waste collected from within the City in other states such as Iowa at times. (Pet. App. B at 18a).

With respect to the collection market, Barker Sanitation has admittedly been impacted by the Franchise Agreement, as the agreement prohibits it from hauling waste from the City. However, Barker Sanitation did not demonstrate that a local interest was given preference over an out-of-state interest or that the former has benefitted at the expense of latter as is required to show discrimination against interstate commerce. *Oregon Waste Sys., Inc.*, 511 U.S. at 99, 114 S. Ct. at 1350 (1994). Rather, the evidence before the trial court was that Waste Connections is an out-of-state hauler that competed with, and prevailed over, two other out-of-state entities in obtaining what is, in effect, the one permit issued to collect solid waste from within the City. (Pet. App. B at 10a). Where in-state and out-of-state interests are equally affected by a local regulation, that is strong evidence that the ordinance is even-handed and not discriminatory. *See South Carolina State Highway Dep't v. Barnwell Bros, Inc.*, 303 U.S. 177, 187, 58 S. Ct. 510, 514 (1938); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72, 101 S. Ct. at 728-29 (1981).

Under Nebraska law, a municipality has an affirmative duty to supervise and control collection and disposal of garbage within its corporate limits. *Tracy v. City of Deshler*, 253 Neb. 170, 174-75, 568 N.W.2d 903, 907 (Neb. 1997); Neb. Rev. Stat. § 13-2023 (Reissue 1997). This can include a single, city-wide contract. *See Tracy, supra* (upholding City's right to go to city-wide hauling against private hauler's state takings claim). Furthermore, "[n]egatively affecting interstate commerce is not the same as discriminating against interstate commerce." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1993). Thus, even if there has been some decrease in the volume of waste making its way to out-of-state facilities or in the numbers of haulers which may haul

within the City, or an increased cost to consumers as a result of the Ordinance, that negative effect on interstate commerce is not the same as discrimination against interstate commerce. To conclude otherwise would result in paralysis for municipalities in attempting to address matters within their traditional responsibilities, where the regulations impacted interstate commerce.

In this case, Barker Sanitation failed to prove that the ordinance at issue, and the associated agreements, had a discriminatory impact on interstate commerce. While they have impacted Barker Sanitation, that impact is particular to Barker Sanitation only. The Commerce Clause is not designed to protect either the "particular structure or methods of operation in a . . . market," *CTS Corp. v. Dynamic Corp. of America*, 481 U.S. 69, 93-94 (1987), or particular interstate firms. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28, 98 S. Ct. 2207, 2214-15 (1978). While Barker Sanitation may be unable to haul from homes and businesses in the City, the interstate market has not been hindered. Solid waste is allowed to leave the City and the State of Nebraska; the franchisee which is the exclusive hauler for the City is an out-of-state entity, not a local entity benefitted at the expense of out-of-state haulers. Under Nebraska law, the City was authorized to contract with a single hauler. *Tracy*, *supra*. Consequently, while the circumstances may have negatively impacted Barker Sanitation, they did not have a discriminatory effect against interstate commerce. Therefore, the decision of the Appellate Court to affirm the District Court's judgment is consistent with previous decisions of this Court and the petition for writ of certiorari should be denied.

IV. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Did Not Have a Discriminatory Purpose Was Consistent with This Court's Prior Decisions.

Barker Sanitation also contends that the Ordinance and associated agreements had a discriminatory purpose, and that the Court of Appeals erred in affirming the District Court's decision that it did not. The City does not dispute the fact that it considered local economics when determining whether to adopt the ordinance at issue. These local economic motivations and concerns, however, do not, in and of themselves, prove that the resulting ordinance, Franchise agreement, and Lease agreement had a discriminatory purpose as Barker Sanitation contends. Indeed, the test for determining whether a discriminatory purpose exists is whether the law at issue "operate[s] as economic protectionism and serve[s] to protect in-state economic interests *at the expense of out-of-state competitors*." *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) [Emphasis added.]

In this case, Barker Sanitation failed to prove that the ordinance and associated agreements "protect[ed] in-state economic interests at the expense of out-of-state competitors." *Id. See generally, C & A Carbone, Inc.*, 511 U.S. at 398-94 (1994); *Hazeltine*, 340 F.3d at 593-96 (2003); *S.D.D.S., Inc.*, 47 F.3d at 268-71. While they do protect the City's economic interests, there is nothing in the Ordinance itself or in the Franchise or Lease Agreements that prohibits Waste Connections (or anyone else for that matter) from taking their waste to other states or that requires them to

deposit their waste at the local transfer station. (Pet. App. B at 14a-18a). In fact, the evidence demonstrates that Waste Connections does in fact transport some of its solid waste to places other than the transfer station and outside the State of Nebraska. (Pet. App. B at 18a). As a result, the only effect of the ordinance and its associated agreements is to require the City's residents to use Waste Connections for solid waste removal *if* those individuals choose to retain such a service.

Further, there is no evidence to suggest that the process by which the City adopted the ordinance was discriminatory in nature. The City issued its Request for Proposals and obtained such proposals from interested entities. (Pet. App. B at 10a). The City did not place any sort of restrictions on who could submit a bid on the project. *Id.* Each entity that placed bids was an out-of-state entity. *Id.* As a result, any argument by Barker Sanitation that the City intended its RFP process to prohibit out-of-state entities from being awarded the franchise agreement is completely without merit and wholly unsupported by the evidence.

To summarize, Barker Sanitation has not, because it cannot, produced evidence which indicates that the Ordinance at issue has a discriminatory purpose. *See Eastern Ky. Resources v. Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 542-43 (6th Cir. 1997) (party presenting circumstantial evidence of discriminatory purpose must show the impact such evidence has on the challenged regulation.) While there is evidence that the City considered the local economics of the Transfer Station, the District Court correctly determined, and the Court of Appeals correctly affirmed, that "constitutionality [of the ordinance] will be by its effects upon interstate, not local, commerce." (Pet. App. B at 26a). This decision is consistent with the rule established by this Court in *Carbone*, and thus the petition for writ of certiorari should be denied.

V. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Did Not Violate the Commerce Clause Because Its Local Benefits Outweighed Its Incidental Burden is Consistent with Prior Decisions of this Court.

Once a court determines that the challenged law is not overtly discriminatory (that is it is not discriminatory on its face or in its purpose or through its effects), it proceeds to the second tier of its analysis. Specifically, the court may still strike down the law "if the burden [the law] imposes on interstate commerce 'is clearly excessive in relation to the putative local benefits.'" *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1994). In applying this test, the District Court correctly determined that the burden imposed on interstate commerce was incidental when weighed against local benefits.

First and foremost, the City acknowledges that the Ordinance, Franchise Agreement, and Lease Agreement benefit it by ensuring the ability to finance its debt on the Transfer Station. However, the evidence demonstrates that this benefit was not the only benefit considered by the City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and entering the franchise and lease agreements with Waste Connections. In its Findings of Fact and Conclusions of Law, the district court identified those benefits as being:

> obtaining certainty of local garbage collection rates; minimizing operating costs of the Transfer Station; having a local collection point for yard waste; satisfying the City's contract with Hamm's

> Quarries; removing Nebraska City from the garbage business; relieving the Agency from its duties of staffing the Transfer Station and purchasing equipment to operate the facility; allowing the Agency to focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizens.

(Pet. App. B at 28a).

These benefits outweighed any burden the arrangement may have on interstate commerce. In fact, the burden this Ordinance creates on interstate commerce is minimal at most. As the District Court stated:

> It is difficult to detect what burden on interstate commerce is imposed by the Ordinance in this case when the Ordinance does not prohibit Waste Connections from taking Nebraska City waste to any in-state or out-of-state transfer facility or landfill (so long as it is a licensed subtitle D landfill disposal facility) and when the Ordinance in no way restricts out-of-state waste from being brought to, and processed in, the Nebraska City Transfer Station. Indeed, the evidence shows that some percent of the waste collected at the Nebraska City Transfer Station is routinely delivered to an Iowa landfill . . .

(Pet. App. B at 30a).

This analysis is consistent with that set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1994) as no evidence was presented to indicate that the goals of the City were accomplished by the illegitimate means of isolating the state from the national economy. Indeed, Barker Sanitation has not put forth evidence regarding the amount of solid waste that left the City for an out-of-state destination prior to the adoption of the Ordinance. There is not evidence that out-of-state entities have not been able to bring waste to the Transfer Station. The only evidence presented is that Barker Sanitation has not been able to collect waste from within the City because the City granted an exclusive franchise to another out-of-state entity. This evidence alone was insufficient to prove that the effect on the interstate market was anything more than incidental. As a result, the petition for writ of certiorari should be denied.

CONCLUSION

The District Court's decision to dismiss Barker Sanitation's claim against the City, and the Appellate Court's affirmation of this decision, is consistent with the rules and analyses set forth by this Court in prior decisions. Ordinance 2505-2000, and the franchise and lease agreements associated therewith, did not discriminate against interstate commerce on their face, in their purpose, or in their effect. Further, the incidental burdens on interstate commerce this Ordinance has is minimal when compared with the local benefits. As a result, the petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN S. GEALY
Counsel of Record
MOLLY M. BRUMMOND
BAYLOR, EVNEN, CURTISS,
GRIMIT & WITT, LLC
1248 "O" Street
Suite 600
Lincoln, NE 68508
(402) 475-1075

Attorneys for Respondent
City of Nebraska City, Nebraska